SUPREME COURT, U. S.
FILED
DEC 24 1980
MICHAEL RODAK, JR., CLERK

No. 80-628

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COWLES COMMUNICATIONS, INC.,

Petitioner,

vs.

JOSEPH L. ALIOTO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

Respondent's opposing brief is illogical and profuse with irrelevant matter.[1] It does not justify denial of review of a judgment that raises serious and important First Amendment questions. We briefly reply to the main points it attempts to make.

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[1] Several irrelevant statements (*e.g.*, that Alioto has argued two cases in this Court, has built a large law firm and had a "brilliant academic career") were obviously inserted to ingratiate. The many references to the first and third trials are irrelevant because those trials ended in hung juries.

I. ALIOTO'S "HEART OF THE ARTICLE" ARGUMENT.

The truth of the LOOK article's statement that Alioto's First San Francisco Bank made loans to Fratianno totaling $105,000 is undisputed. Alioto's brief argues (at 10-15) that these bank loans are the "heart of the article" and that if the statements concerning Alioto's Nut Tree meetings with Fratianno are false, the article considered as a whole becomes substantially false. This argument is fallacious for two reasons.

First, it assumes that without the Nut Tree meetings there would be virtually no connection between Alioto and the Fratianno bank loans. However, there are at least three other connections in the record separate and apart from Nut Tree. Prior to the loans, Fratianno made several long distance telephone calls to Alioto, Fratianno met with Alioto at least once in Alioto's office, and Alioto called a loan officer at the bank and recommended Fratianno for the loans, saying "his credit is considered good by all with whom he has done business." (T.R. 1254, Second Trial.) Thus, if the Fratianno bank loans are the "heart of the article," Alioto's connections to them are amply supported without regard to whether or not Alioto met with Fratianno to discuss the loans at Nut Tree.

Second, Alioto's argument at the very most presents an untried question of fact. It clearly cannot be held as a matter of law that if the bank loans are the "heart of the article" and the Nut Tree statements are untrue, the article read as a whole is substantially false. As shown in the Petition (at 16-17), petitioner has *never* had a trial and determination by a trier of fact of the factual issue of substantial truth of the article read as a whole.

II. ALIOTO'S ARGUMENT CONCERNING THE DEFAMATION INSTRUCTION AT THE SECOND TRIAL.

Alioto does not attempt to defend the first interrogatory at the second trial, "Was the article false in one or more particulars?" He relies instead on the instruction that Judge Smith gave with the second interrogatory, "Was the article defamatory?" Alioto contends that this instruction properly informed the jury that it should consider the article as a whole. (Resp. Br. 17-19.)

However, the defamation instruction (reproduced in Resp. Br. at A-2) not only failed to cure the prejudicial error of the first interrogatory, it merely compounded that error.[2] In addition to being confusing and in some parts unintelligible, it compelled the jury to keep focusing on particular segments of the article, in accord with the first interrogatory and contrary to California law and the First Amendment. There is no doubt that the jurors were confused because after two days of deliberation they requested clarification. Judge Smith's "clarification" only worsened the error:

> THE COURT: Ladies and gentlemen, I have your question, and just for the sake of the record, I will read this.
>
> "If we find that one statement is false and defamatory, have we proven that the article is defamatory, or do we need two, three or four statements in the article to be proven false and defamatory in order to prove that the article is defamatory?"

---

[2] Petitioner specifically objected to Judge Smith's defamation instruction as "preclud[ing] the jury from finding truth or falsity of the article based on the truth or falsity of the article's central theme." (R.T. 177, 10/25/72.)

> Now, I would answer that in this way. If one statement taken in the article is false, and if that statement, read in the context of the entire article, is defamatory, then the article may be said to be defamatory. (R.T. 3, 10/26/72.)

The jury's question clearly demonstrates the prejudice wrought by both the falsity and the defamation interrogatories; for two days of deliberations the jury had been considering the article *not* as a whole but as an assortment of bits and pieces. Judge Smith's "clarification"—to which petitioner objected (R.T. 7, 10/26/72)—failed to eliminate that prejudice. On the contrary, by focusing the jury's attention on "one [false] statement," Judge Smith further clinched the deprivation of petitioner's First Amendment right to a determination of the substantial truth of the article considered as a whole.

III. ALIOTO'S WAIVER CLAIM.

Respondent's brief simply echoes the statements and citations appearing in the Ninth Circuit's opinion to support its technical holding of waiver. (Resp. Br. 19-22.) Respondent totally disregards this Court's long-standing presumption against waiver of fundamental constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). In addition, respondent cavalierly ignores the repeated holdings of this Court in the *New York Times* libel context, requiring that when the defendant, as here, challenges the sufficiency of the evidence, there must be an independent examination of the record as a whole to determine whether the judgment constitutes "a forbidden intrusion on the field of free expression." *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 85 (1967). *See* cases cited in Petition 14. *Accord: Ryan v. Brooks*, ... F.2d ....., 6 Med. L. Rep. 2155 (4th Cir. Oct. 17, 1980). See also *Founding Church of Scientology v.*

United States, 409 F.2d 1146, 1164 n.2 (D.C. Cir. 1969), where the Court declared:

> "In any case, a denial of First Amendment rights is one of those exceptional instances where an appellate court will notice error in the charge even where no objection is made at trial."

CONCLUSION

For the foregoing reasons and those set forth in the Petition, we submit that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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DATED: December 23, 1980